UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 329

WILLIAM G. BRAKEFIELD, *Petitioner*,

v.

WALTER P. McFARLAND, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on the 24th day of April, 1968.

OPINION BELOW

Neither the United States Circuit Court of Appeals for the District of Columbia Circuit, nor the United States District Court for the District of Columbia rendered any opinion herein. The judgment of the

United States Court of Appeals for the District of Columbia Circuit is annexed as Appendix A, and the judgment of the United States District Court is annexed as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (App. A) was entered April 24, 1968 affirming the judgment of the United States District Court for the District of Columbia (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review a judgment of an United States Court of Appeals.

QUESTION PRESENTED

May a District Court refuse to accept a plaintiff's choice of forum and dismiss a cause of action for *forum non conveniens* on the ground that it can thereby reduce its congested docket when there is no showing of inconvenience to defendant and when plaintiff's ability to present his case is likely impeded by trial in another forum.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C.A. Sec. 1404

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

District of Columbia Code Sec. 11-521

> (a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States

district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District, and . . . .

STATEMENT OF THE CASE

1. Petitioner, a citizen of the State of Virginia brought this action for malicious prosecution in the District Court of the District of Columbia against Respondent, also a citizen of Virginia. Service was made on Respondent within the District, thus invoking jurisdiction of the court pursuant to D.C. Code Sec. 11-521. On motion, the District Court dismissed "for inconvenience of forum" (App. B) and the Court of Appeals affirmed.

2. No contention was or can be made that the forum was inconvenient to the defendant or to his witnesses. Rather, Respondent urged that *forum non conveniens* should be invoked in that the District of Columbia Court's docket was congested and the litigation arose out of occurrences in Arlington, Virginia. No effort was made to show that there would be any greater inconvenience or impedance to Respondent by trial in the District of Columbia rather than in State Court in Arlington, or elsewhere, in Virginia. A showing was made by Petitioner that trial elsewhere would impede him in that his proofs of damages would be adduced in substantial part from financial institutions located in the District of Columbia, not amenable to Virginia state process, and unlikely to voluntarily testify. While the District of Columbia Code contains a procedure under which District witnesses are avail-

able to out of state courts in *criminal* cases (see District of Columbia Code, Section 23-801, et seq.), there is no such procedure or provision with respect to *civil* cases under which testimony and records located in the District of Columbia can be subpoenaed for civil trial outside of the District. A plain showing that the chosen forum was and continues to be *the* convenient forum was therefor made.

REASONS FOR THE ALLOWANCE OF THE WRIT

The District Court for the District of Columbia was and continues to be convenient to Petitioner and "... unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947).

No inconvenience has been shown by the Respondent, and, in fact, there is none that can be shown. Respondent resides in Arlington, Virginia and his home and office are not more than 4 miles by road from the District Court for the District of Columbia. Any witnesses whom he might call, will certainly find it as easy, if not easier, to arrange their appearance in the District of Columbia Court as in any other court where this action could be brought, and process for their appearance is equally available to him.

The doctrine of *forum non conveniens* is a court made doctrine which is based on equity and designed to prevent oppression of a defendant. *Moore, Federal Practice* 4.02[5] (1966); *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 507 (1947). No burden whatsoever to Respondent was shown.

Nor is there any evidence that Petitioner has sought to have the trial take place at an inconvenient place for the Respondent. The Court below was asked to, and did dismiss on the ground that it could thereby reduce its docket. It is true that courts have taken this *factor* into consideration in *forum non conveniens* cases. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947). But, as a reading of *Gulf Oil* makes clear, it is only one among many factors, *and cannot by itself become the basis for dismissal absent unfair burden on the defendant.* For this would completely divert the doctrine from its equity founded purpose designed to ensure a defendant against oppression, *Altman* v. *Central of Georgia Railway,* 124 U.S. App. D.C. 155, 363 F. 2d 284 (1966) *cert. den.* 384 U.S. 920 (1966); *Daquila* v. *Schlosberg,* 102 U.S. App. D.C. 366, 253 F. 2d 888 (1958); *Caspar* v. *Devine;* 103 U.S. App. D.C. 193, 257 F. 2d 197 (1958); and *Wiren* v. *Laws,* 90 U.S. App. D.C. 105, 194 F. 2d 873 (1951), to a doctrine designed to enable courts to sweep clear their dockets.

This case was filed, and dismissed, as a companion to *Westreich* v. *McFarland,* see No. 305 this term. In *Westreich* jurisdiction rested on diversity and service within the District under Sec. 11-521 of the D.C. Code. Dismissal there is contended to violate the provisions of Sec. 1404(a) (28 U.S.C. 1404) mandating transfer of a case to any other district "where it might have been brought" rather than dismissal in *forum non conveniens* cases. Since diversity does not appear in this case, the cause could not have been brought in a federal court other than the District of Columbia, and therefore Sec. 1404(a) does not apply. The difference in the jurisdictional bases in the two cases, one calling

into play Sec. 1404(a) and the other not, would give a definitive swath to the ruling here and lay to rest a recurring problem area. The Court of Appeals for the District of Columbia Circuit has erected a new and far-reaching rule of dismissal "for the convenience of the court" by these two cases, and the policy considerations which underlie this rule require early appraisal by this Court in its supervisory capacity.

CONCLUSION

The District Court in ordering the dismissal of Petitioner's cause on the grounds of *forum non conveniens*, erred in:

(a) ordering the case dismissed; and,

(b) in finding that the doctrine of *forum non conveniens* was applicable.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967

No. 21,517

STANLEY WESTREICH, *Appellant,*

v.

WALTER P. MCFARLAND, *Appellee.*

No. 21,518

WILLIAM BRAKEFIELD, *Appellant,*

v.

WALTER MCFARLAND, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: Bastian, Senior Circuit Judge, and Burger and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this Court that the orders of the District Court appealed from in these cases are hereby affirmed.

Per Curiam

Dated: April 24, 1968

APPENDIX B

Order

This cause having come on to be heard upon the motion of the defendant, Walter P. M Farland, to dismiss the complaint for inconvenience of forum, and the Court having heard the arguments of counsel for both the defendant and the plaintiff and being fully advised in the premises; it is this 18th day of October, 1967.

ORDERED, that the motion of the defendant, Walter P. McFarland, to dismiss the complaint for inconvenience of forum be, and the same hereby is granted, and the complaint is hereby dismissed.

/s/ EDWARD M. CURRAN
Chief Judge Edward M. Curran